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In the Supreme Court of the United States

OCTOBER TERM, 2000 NOV 13 2000

TUAN ANH NGUYEN AND JOSEPH BOULAIS,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Writ of Certiorari To the United States Court of Appeals For the Fifth Circuit

BRIEF OF *AMICUS CURIAE* ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PETITIONERS

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NOVEMBER 13, 2000

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TABLE OF CONTENTS

		Page
INTEREST OF AMICUS CURIAE		1
SUMMARY OF ARGUMENT		2
ARGUMENT		4
I.	THE COURT HAS THE POWER TO REMEDY THE VIOLATION OF BOULAIS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS	4
	A. The Remedy Sought is Not the Conferral of Citizenship But Rather a Traditional Judicial Remedy	4
	B. The Court's Fundamental Power to Sever Unconstitutional Provisions From a Statute is Not Undermined by the Plenary Power Doctrine	7
II.	THE APPROPRIATE REMEDY FOR THE UNCONSTITUTIONAL GENDER CLASSIFICATION IN 8 U.S.C. § 1409 IS TO SEVER SUBSECTIONS 1409(a)(3) AND (a)(4) FROM THE STATUTE	15
CONCLUSION		23

TABLE OF AUTHORITIES

CASES

Aguayo v. *Christopher*, 865 F. Supp. 479 (N.D. Ill. 1994) 11

Alaska Airlines, Inc. v. *Brock*, 480 U.S. 678 (1987) . . 19, 20

Baker v. *Carr*, 369 U.S. 186 (1962) 8

Bell v. *Hood*, 327 U.S. 678 (1946) 8

Bivens v. *Six Unknown Named Agents of Fed'l Bureau of Narcotics*, 403 U.S. 388 (1971) 8

Buckley v. *Valeo*, 424 U.S. 1 . . . . . 14, 17, 21

Califano v. *Goldfarb*, 430 U.S. 199 (1977) 21

Califano v. *Silbowitz*, 430 U.S. 924 (1977) 21

Califano v. *Westcott*, 443 U.S. 76 (1979) 16, 21

Champlin Refining Co. v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210 (1932) 19, 20

Davis v. *Passman*, 442 U.S. 228 (1979) 8, 11

Deckert v. *Independence Shares Corp.*, 311 U.S. 282 (1940) 8

El Paso & Northeastern R. Co. v. *Gutierrez*, 215 U.S. 87 (1909) 21

Felker v. *Turpin*, 518 U.S. 651 (1996) 20

Franklin v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) 8

Frontiero v. *Richardson*, 411 U.S. 677 (1973) 9, 17, 21, 22

Graham v. *Richardson*, 403 U.S. 365 (1971) 22

Heckler v. *Mathews*, 465 U.S. 728 (1984) 7, 16, 20, 21, 22

INS v. *Chadha*, 462 U.S. 919 (1983) 8, 12, 13, 14, 19

INS v. *Pangilinan*, 486 U.S. 875 (1988) 5, 6, 10, 11

Iowa-Des Moines National Bank v. *Bennett*, 284 U.S. 239 (1931) 16, 22

Jablon v. *Califano*, 430 U.S. 924 (1977) 21

Jimenez v. *Weinberger*, 417 U.S. 628 (1974) 21

Lake v. *Reno*, 226 F.3d 141 (2d Cir. 2000) 5

McCulloch v. *Maryland*, 4 Wheat. 316 (1819) 14

Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 8, 9, 14

Miller v. *Albright*, 523 U.S. 420 (1998) . . . . . passim

Miller v. *Christopher*, 96 F.3d 1462 (D.C. Cir. 1996), *aff'd*, 523 U.S. 420 (1998) 6

Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) 17

Regan v. *Time, Inc.*, 468 U.S. 641 (1984) 21

Richardson v. *Griffin*, 409 U.S. 1069 (1972) 21

Rotsker v. *Goldberg*, 453 U.S. 57 (1981) 12

Skinner v. *Oklahoma*, 316 U.S. 535 (1942) 16

United States Dep't of Agric. v. *Moreno*, 413 U.S. 528 (1973) 18, 21

Wauchope v. *United States Dep't of State*, 985 F.2d 1407 (9th Cir. 1993) 10, 11

Webster v. *Doe*, 486 U.S. 592 (1988) 20

Weinberger v. *Weisenfeld*, 420 U.S. 636 (1975) 18, 21

Welsh v. *United States*, 398 U.S. 333 (1970) 9, 12, 22

STATUTES

8 U.S.C. § 1101(23) 5, 20

8 U.S.C. § 1401(g) 5, 15, 24

8 U.S.C. § 1409 . . . . . passim

8 U.S.C. § 1421(d) 20

Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) 2

§ 309, 66 Stat. 238 2

§ 406, 66 Stat. 281 19

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BRIEF OF *AMICUS CURIAE* ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City.[1] AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of lawsuits, legal advocacy and dissemination of public information. AALDEF has provided assistance to many individuals and families with citizenship and immigration issues. The legal and factual problems presented by this lawsuit affect large numbers of Asian-American children. The courts

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[1] All parties in this matter have consented to the filing of this *Amicus Curiae* brief, as evidenced by letters of consent filed with the Clerk. AALDEF is not related in any way to any party in this case, and no party or its counsel has authored any part of AALDEF's brief. No person or entity other than AALDEF and its counsel has made any monetary contribution to the preparation of this brief.

must not fail to provide the petitioners a remedy for unequal treatment simply because issues of citizenship are involved.

SUMMARY OF ARGUMENT

At issue in this case is the power of this Court to grant a remedy in a justiciable case to a United States citizen aggrieved by an unconstitutional statute.

The petitioners, a U.S. citizen father (Boulais) and his son (Nguyen), challenge the constitutionality of Section 309 of the Immigration and Nationality Act ("INA"), ch. 477, 66 Stat. 163, 238 (1952) (codified as amended at 8 U.S.C. § 1409 (1999)), which governs the transmission of citizenship at birth to non-marital children born abroad to parents, one of whom is a U.S. citizen. According to petitioners, § 1409 violates Boulais' Fifth Amendment right to equal protection of the laws because it imposes two stringent requirements on U.S. citizen fathers not applicable to U.S. citizen mothers. *Id.* §§ 1409(a)(3) and (a)(4). Petitioners ask the Court to remedy this unequal treatment of fathers by striking these constitutionally offensive provisions and to acknowledge Nguyen's citizenship pursuant to the remainder of the statute. In its brief in response to the Petition for a Writ of Certiorari, however, the government suggests that even if the Court finds that § 1409 unconstitutionally discriminates against Boulais on the basis of sex, it is without power to grant a remedy. Because of the unprecedented nature of the government's position and its harsh implications for the ability of litigants to obtain relief from injuries caused by unconstitutional statutes, we write to address the Court's power and duty to grant the relief petitioners request.

1. The remedy petitioners seek does not require the Court to exercise a power reserved to Congress. Petitioners do not ask the Court to confer citizenship on Nguyen, but rather to confirm the citizenship Congress bestowed on him under the statute unencumbered by unconstitutional defects. As a majority of the Court found in *Miller* v. *Albright*, 523 U.S. 420 (1998), considering the same statutory provisions at issue here, such a remedy does not run afoul of the principle that courts may not grant citizenship as an equitable remedy in the absence of legislative authority.

A contrary holding would amount to an unprecedented ruling that the Court, when faced with a litigant aggrieved by the application of an unconstitutional statute, is completely powerless to remedy the constitutional violation and to grant the litigant relief. Such a radical reduction in the Court's remedial power strikes at the very essence of judicial review recognized since *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). The power to review entails the power to cure constitutional defects in congressional acts. This inherent judicial power is not eliminated merely because the statute subject to judicial review was enacted pursuant to a congressional power said to be plenary.

2. Assuming that § 1409 violates the Constitution's equal protection requirement, the appropriate remedy is to sever §§ 1409(a)(3) and (a)(4) from the statute. Severance is the remedy that best comports with Congress' intent, as evidenced by the long statutory tradition of conferring citizenship at birth to children born abroad to American citizens and by Congress' inclusion of a severability clause in the statute. Severance also furthers the Court's policy of refraining from invalidating more of a statute than is necessary. Furthermore, severance accords with the Court's longstanding preference for extending the benefits (or removing the burdens) of constitutionally underinclusive statutes.

ARGUMENT

I.

THE COURT HAS THE POWER TO REMEDY THE VIOLATION OF BOULAIS' CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS

A. The Remedy Sought is Not the Conferral of Citizenship But Rather a Traditional Judicial Remedy

The remedy petitioners seek – an acknowledgment of Nguyen's citizenship pursuant to a statute purged of its constitutionally offensive provisions – is a traditional judicial remedy for injuries caused by constitutionally underinclusive statutes. As a majority of the Court found in *Miller* v. *Albright*, 523 U.S. 420 (1998), addressing the same statutory provision at issue in this case, 8 U.S.C. § 1409, such a remedy does not constitute a grant of citizenship by the Court. Petitioners do not ask the Court to confer citizenship on Nguyen. Rather, petitioners merely ask the Court to strike the two provisions of the statute – subsections 1409(a)(3) and (a)(4) – that violate the equal protection requirement of the Fifth Amendment. Once the unconstitutional provisions are excised, "[t]he statute itself" – and not the Court – would operate to "grant[]" Nguyen "citizenship automatically, and 'at birth.'" *Miller*, 523 U.S. at 489 (Breyer, J., dissenting). In other words, if petitioners were to prevail, a "judgment in [their] favor would confirm [Nguyen's] pre-existing citizenship rather than grant [him]

rights that [he] does not now possess." *Id.* at 432 (Stevens, J.).[2]

Since petitioners do not ask the Court to grant citizenship, the remedy sought does not implicate the principle announced in *INS* v. *Pangilinan*, 486 U.S. 875, 885 (1988), that the general equitable powers of the federal courts do not include "the power to confer citizenship in violation of [statutory] limitations." *Id.* at 885. In *Pangilinan*, a group of Filipino nationals sought naturalization under a special immigration statute that applied only to certain aliens who filed applications for naturalization prior to December 31, 1946. The Filipino nationals conceded that they were not statutorily eligible for naturalization because they did not file their applications prior to the cutoff date. Nonetheless, more than 30 years after the expiration of the statute, they claimed that they were entitled to naturalization as an equitable remedy because the Attorney General had violated the statute by failing to make available a naturalization officer for several months before the cutoff date. The Court held that it could not, as an equitable remedy for the Attorney General's violation of the statute, confer citizenship upon aliens who did not meet the statutory requirements for naturalization. *Id.* at 883-84.

Here, unlike in *Pangilinan*, Nguyen "is not an alien who seeks naturalization as an equitable remedy." *Lake* v. *Reno*, 226 F.3d 141, 149 (2d Cir. 2000) (addressing challenge to § 1409). The INA clearly defines naturalization as "the conferring of nationality of a state upon a person after birth . . . ." 8 U.S.C. § 1101(23) (1999). In contrast, Congress conferred citizenship upon Nguyen at birth, and petitioners

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[2] The government is therefore mistaken that there is no "statute conferring citizenship" upon Nguyen. (Gov't Br. in Response to Cert. Pet., at 4 n.8.) Sections 1401(g) and 1409(a), purged of its constitutional defects, grant him citizenship.

merely ask the Court "to recognize his status, not to confer citizenship." *Lake*, 226 F.3d at 149. Thus, a recognition of Nguyen's citizenship does not run afoul of the *Pangilinan* Court's admonition that only Congress has the power to confer citizenship to persons not constitutionally entitled to citizenship, 486 U.S. at 883-84, because, unlike the respondents in *Pangilinan*, Nguyen's citizenship derives directly from an act of Congress.[3]

A majority of this Court reached the same conclusion in *Miller*. Justice Stevens' opinion agreed with the Court of Appeals' decision in *Miller* that *Pangilinan* did not destroy Miller's standing to contest the government's refusal to treat her as a citizen by rendering the Court incapable of redressing her injury. *Miller*, 523 U.S. at 433 (Stevens, J.).[4] And the dissenting Justices found that "[w]hatever limitations there may be upon a Court's powers to grant citizenship, those limitations are not applicable here, for the Court need not grant citizenship." *Id.* at 488-89 (Breyer, J., dissenting).

Accordingly, the Court should follow the decision reached by a majority of the Justices in *Miller* and hold that an order striking the constitutionally offensive provisions from

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[3] As discussed further *infra*, at 10-11, *Pangilinan* is also distinguishable from this case on another crucial ground: the holding that a grant of citizenship was not an appropriate equitable remedy did not relate to a claim that the act of Congress violated the Constitution.

[4] The Court of Appeals had held that Miller's claim was redressable because, if the statutory provision was held to be unconstitutional, the court could have found Miller to be a U.S. citizen pursuant to the remainder of the statute. *Miller* v. *Christopher*, 96 F.3d 1467, 1470 (D.C. Cir. 1996), *aff'd*, 523 U.S. 420 (1998). "Such a finding," the court held, "would not have violated *Pangilinan*'s proscription on the exercise of judicial equitable power to confer U.S. citizenship in the absence of legislative authority." *Id.*

§ 1409 and recognizing Nguyen's citizenship pursuant to the remainder of the statute does not constitute an impermissible judicial grant of citizenship.

Indeed, a contrary holding would lead to an anomalous result. The remedy sought here is no more a conferral of citizenship by the Court than a remedy extending the benefits of a constitutionally underinclusive welfare statute is a conferral of welfare benefits by the Court. As the cases cited *infra* at 21-22 illustrate, the Court regularly applies its remedial authority to strike unconstitutional limitations on access to benefits conferred by Congress when it determines that extension of the statutory benefits to the class excluded better comports with congressional intent than withdrawal of the benefits from the class included. Although the power to grant welfare benefits is not among the federal courts' general equitable powers, no one contends under such circumstances that an order striking an unconstitutional restriction on eligibility for welfare benefits constitutes an impermissible judicial exercise of legislative power. To the contrary, as part B, *infra*, demonstrates, a holding that an order striking unconstitutional provisions from a congressional statute is tantamount to a judicial usurpation of legislative authority would impermissibly limit the judicial power.

B. The Court's Fundamental Power to Sever Unconstitutional Provisions From a Statute is Not Undermined by the Plenary Power Doctrine

It is well settled that, as a general matter, the Court has the inherent power "to sever the unconstitutional portion [of a statute] from the remainder, and to apply the remainder unencumbered." *Miller*, 523 U.S. at 457 (Scalia, J., concurring in the judgment); *see also Heckler* v. *Mathews*, 465 U.S. 728,

738-39 (1984). Such a remedial power is a necessary corollary to the judicial power to determine cases or controversies before it and interpreting the Constitution.

This Court undoubtedly has the power to remedy violations of the Constitution in justiciable cases within its jurisdiction. It is an inherent feature of the judicial power that "justiciable constitutional rights are to be enforced through the courts." *Davis* v. *Passman*, 442 U.S. 228, 242 (1979).[5] The power to enforce implies the power to grant a remedy. *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992) ("From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court. . . ."); *Davis*, 442 U.S. at 245 ("[I]t is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.") (quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946)); *Bivens* v. *Six Unknown Named Agents of Fed'l Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (quoting same); *cf. Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288 (1940) ("The power to enforce [a statute] implies the power to make effective the right of recovery" under the statute.).

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[5] Although the *Davis* Court noted an exception for "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," 442 U.S. at 242 (citing *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)), that exception does not apply to challenges to the constitutionality of a statute. *See INS* v. *Chadha*, 462 U.S. 919, 942 (1983) (political question doctrine does not apply to constitutional challenge to the INA because question of "constitutionality of a statute" is "a decision for the courts"). The political question doctrine addresses the Court's authority to determine a constitutional question, not to remedy a constitutional violation. There is no suggestion here that the text of the Constitution reserves the determination of substantive equal protection challenges to Congress.

As part of its power to remedy constitutional injuries, the Court has always recognized its power to remedy the unequal treatment effected by a constitutionally underinclusive statute. *See, e.g., Frontiero* v. *Richardson*, 411 U.S. 677, 691 n.25 (1973) (striking requirement that female members of the uniformed services prove the dependency of their spouses to obtain increased housing and medical benefits when male members were not subject to the same requirement); *see also* cases cited *infra*, at 16-22. To determine the appropriate means of removing the constitutional infirmity from an underinclusive statute, the Court typically looks to the intent of Congress to determine the remedy that best fulfills that intent. *See, e.g., Welsh* v. *United States*, 398 U.S. 333, 355-56 (1970) (Harlan, J., concurring) (noting "the presumed grant of power to the courts to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or to extend it to render what Congress plainly did intend, constitutional"). When a Court strikes an unconstitutional provision from a statute pursuant to such an inquiry, it exercises its judicial prerogative to interpret and enforce the Constitution and the statute. It does not infringe on the legislative prerogative because its choice of remedies is that which is consistent with Congress' intent.

The government's position that the Court is without the power to strike the unconstitutional provisions from § 1409 is nothing less than an assault on the principles of judicial review announced in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Under *Marbury*, once the Court decides that the statutory provisions governing the petitioners' case conflict with the Constitution, it "must determine which of these conflicting rules governs the case" and "decide on the operation of each." *Id.* at 177-78. As Justice Marshall declared, "[t]his is of the very essence of judicial duty." *Id.* at 178. In determining the operation of the statute, the Court may not give effect to provisions that it determines violate the Constitution

because, as Marbury teaches, "an act repugnant to the Constitution" may not "become the law of the land." *Id.* at 176; *see also id.* at 177 ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . ."). Accordingly, in a justiciable case, the Court cannot avoid striking down statutory provisions that violate the Constitution. Such a "remedial" power is implied in the Court's power and duty to "say what the law is." *Id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."). A finding that the Court is without the power to remedy a constitutionally underinclusive statute is tantamount to a declaration that "an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory," and that the unconstitutional act, "notwithstanding the express prohibition, is in reality effectual." *Marbury*, 5 U.S. (1 Cranch) at 178.

Citing *Pangilinan*, the government nonetheless suggests that the judiciary is powerless to remedy constitutionally underinclusive statutes when those statutes deal with matters of immigration and naturalization, over which Congress' power is said to be "plenary." (Gov't Br. in Response to Cert. Pet., at 4 n.8.) Any such remedy, according to the government, would result in an alteration of the eligibility requirements for citizenship – a result which the Court may not effectuate even if those eligibility requirements violate the Constitution.

But *Pangilinan* does not support such a sweeping limitation on the Court's power to remedy unconstitutional provisions in statutes granting citizenship. *Pangilinan* did "not speak to the courts' capacity to utilize traditional constitutional remedies to rectify constitutional violations." *Wauchope* v. *United States Dep't of State*, 985 F.2d 1407, 1418 (9th Cir. 1993). Rather, *Pangilinan* merely held that courts do not have an independent power to confer citizenship contrary to a

statutory command as an equitable remedy for statutory violations. 486 U.S. at 883-84. Thus, "[b]y recognizing the judiciary's narrow statutory powers with respect to citizenship," the *Pangilinan* Court did not "carve[] out an exception to the traditional authority of courts to remedy equal protection violations by extending the benefits of a discriminatory statute to a disfavored class." *Wauchope*, 985 F.2d at 1418. Indeed, the *Pangilinan* Court itself did not consider its holding with respect to equitable remedies applicable to constitutional claims. After discussing the limitations on federal courts' equitable powers to remedy statutory violations, the Court proceeded to consider (and reject) the merits of the respondents' due process and equal protection claims. *Pangilinan*, 486 U.S. at 885-86.

That the *Pangilinan* Court addressed only remedies for violations of statutory, and not constitutional, rights makes it fundamentally different from this case. The remedies available (express or implied) for violations of statutory rights are circumscribed by the terms of the statute creating such rights. *See Davis*, 442 U.S. at, 241 ("[I]t is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner.") The remedies available for violations of constitutional rights, on the other hand, do not depend on specific congressional authorization. Rather, "the judiciary is clearly discernible as the primary means through which [constitutional] rights may be enforced." *Id.* As one court noted, "one of the oldest principles of constitutional law holds that the judiciary's powers are qualitatively different when a controversy requires a judge to interpret and give effect to the Constitution. Courts do not allow 'statutory limitations' to block the enforcement of the Constitution." *Aguayo* v. *Christopher*, 865 F. Supp. 479, 487 (N.D. Ill. 1994) (citing *Marbury*, 5 U.S. (1 Cranch) at 178).

The government's contention that the "plenary power" of the political branches over immigration and naturalization matters somehow strips the Court of its remedial powers over constitutional underinclusive statutes is unprecedented. While the Court has often deferred to the political branches' substantive immigration and naturalization decisions under the plenary power doctrine,[6] it has never held that the plenary power doctrine prevents the Court from *remedying* constitutional violations committed in the course of Congress' exercise of that power.

Indeed, in other areas in which Congress' power is said to be plenary, there has never been a suggestion that the Court is powerless to remedy a constitutionally underinclusive statute. Thus, in *Welsh*, 398 U.S. at 363-64 (Harlan, J., concurring), Justice Harlan saw no difficulty in concluding that a constitutionally underinclusive draft registration statute should be remedied by extending the conscientious objector exemption even though that decision would have the effect of changing the eligibility requirements for military service – something over which Congress' power is said to be plenary. *Cf. Rotsker v. Goldberg*, 453 U.S. 57 (1981) (deciding merits of equal protection challenge to congressional statute requiring only men to register for draft which, if successful, would have resulted in expansion of class of persons subject to draft).

That the Court has the power to sever an unconstitutional provision from the INA was confirmed in INS v. *Chadha*, 462 U.S. 919 (1983). In *Chadha*, an immigration judge, acting pursuant to the authority Congress delegated to the Attorney General in §§ 244(a) and 244(c)(1) of the INA,

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[6] As petitioners argue in their brief, however, the Court has never extended plenary power to citizenship at birth.

ordered the suspension of Chadha's deportation. Thereafter, pursuant to § 244(c)(2) of the INA, which provided that one house of Congress may veto the decision of the Attorney General to suspend the deportation of an alien, the House of Representatives passed a resolution reversing the suspension of Chadha's deportation. Chadha then brought suit challenging the constitutionality of § 244(c)(1). The Court held that § 244(c)(1) indeed violated the Constitution and, relying on the same severability clause applicable in this case, severed that invalid provision from the statute. The Court's order had the effect of preventing Chadha's deportation despite the specific intent of Congress to the contrary.[7] Indeed, it had the effect of increasing the number of persons subject to suspension of deportation by eliminating Congress' authority to reverse such orders. Yet there was no suggestion that the Court therefore did not have the power to sever § 244(c)(1) from the statute.

It is true that Chadha challenged § 244(c)(2) under the presentment and bicameralism requirements of the Constitution, whereas the petitioners here challenge § 1409 under the equal protection requirement of the Fifth Amendment. That distinction, however, should make no difference to the question of whether the Court has the power to remedy the constitutional violations by severing the unconstitutional provisions from the statute. In either case, a favorable Court decision would have the effect of judicially altering the immigration status of the petitioners and persons similarly situated. The relief requested here is no more an invidious judicial conferral of citizenship than the Court's order in *Chadha* was a judicial suspension of deportation.

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[7] As the *Chadha* Court noted, "if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him." 462 U.S. at 939-40 (quoting *Chadha* v. *INS*, 634 F.2d 408, 419 (9th Cir. 1980)).

As the discussion above illustrates, any decision striking down a provision of the INA will have the effect of altering the rules Congress set for immigration and naturalization to comport with the requirements of the Constitution. Accordingly, the government's argument that the Court may not order a remedy that would have the effect of changing a litigant's immigration or citizenship status boils down to a contention that the Court is without power to review the constitutionality of legislation affecting immigration and naturalization. This Court has already rejected that contention in *Chadha*. In response to the government's argument in *Chadha* that the plenary power doctrine prevented the Court from engaging in judicial review of the INA, this Court said:

> As we made clear in *Buckley* v. *Valeo*, 424 U.S. 1 (1976): "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction." *Id.*, at 132.

Chadha, 462 U.S. at 941. And indeed, the government concedes that the Court may decide the constitutionality of § 1409. (Gov't Br. in Response to Cert. Pet., at 8 n.4.)

In sum, there is nothing in the plenary power doctrine that undercuts the judiciary's essential power to strike down unconstitutional provisions in an act of Congress. The remedy sought here is no more than a traditional judicial remedy for constitutionally underinclusive statutes; any ensuing "grant" of citizenship will derive from the operation of the statute and not from an act of the Court. The government's position, on the other hand, would radically redefine the nature of the judicial power. It would require the Court to give effect to an

unconstitutional law, leaving petitioners without any remedy for a clear violation of a constitutional right. But as Chief Justice Marshall stated, our government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury*, 5 U.S. (1 Cranch) at 163.

II.

THE APPROPRIATE REMEDY FOR THE UNCONSTITUTIONAL GENDER CLASSIFICATION IN 8 U.S.C. § 1409 IS TO SEVER SUBSECTIONS 1409(a)(3) AND (a)(4) FROM THE STATUTE

Petitioners are aggrieved by the impermissible gender distinction employed by Section 1409 between U.S. citizen fathers and U.S. citizen mothers in the transmission of citizenship to their non-marital, foreign-born children. Petitioners and *amici* contend that the appropriate remedy for such unconstitutional discrimination is for the Court to strike subsections 1409(a)(3) and (a)(4) from the remainder of the INA. Subsection 1409(a)(3) requires that citizen fathers agree in writing to provide financial support for their child until the child reaches the age of 18. Subsection 1409(a)(4) requires that, before the child reaches the age of 18, citizen fathers legitimate their child or acknowledge paternity under oath, or that a court establish paternity. Neither of these requirements is applicable to citizen mothers.[8] Accordingly, as petitioners

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[8] While §1409(c) imposes a one-year continuous residency requirement on citizen mothers and not citizen fathers, citizen fathers are subject to a five-year residency requirement pursuant to 8 U.S.C. § 1401(g). Whatever disparity would remain if the Court were to strike subsections 1409(a)(3) and

(continued...)

argue in their brief, the statute is constitutionally underinclusive because it renders it more difficult for citizen fathers to transmit citizenship at birth to their children.

Severance of subsections 1409(a)(3) and (a)(4) is the appropriate remedy to cure this constitutional defect for several reasons. Principally, severance of these constitutionally offensive provisions is the remedy that most faithfully accords with Congress' intent in enacting the citizenship-at-birth scheme of the INA. When an equal protection claim is sustained with respect to an underinclusive statutory regime, the Court faces "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984) (quoting *Welsh* v. *United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)); *see also Califano* v. *Westcott*, 443 U.S. 76, 89 (1979); *Skinner* v. *Oklahoma*, 316 U.S. 535, 543 (1942); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931). This general rule is premised on the notion that the appropriate remedy for the abridgment of the right to equal protection is a mandate of equal treatment, "a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Mathews*, 465 U.S. at 740.

In deciding which of these remedial alternatives to apply, the Court is guided by the intent of Congress. *See Mathews*, 465 U.S. at 739 n.5. Specifically, the Court looks to

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[8] (...continued)
(a)(4) is not being challenged by petitioners here because petitioner Boulais satisfies the requirements of section 1401(g) and, even if imposed on him, the requirements of §1409(c).

legislative intent to determine whether or not severance of the offensive provision is the appropriate remedy. *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999)(The question of whether a statutory provision is severable "is essentially an inquiry into legislative intent."). "'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.'" *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (quoting *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932)).

To determine the appropriate remedy here, therefore, the Court should look to Congress' intent in enacting the citizenship-at-birth scheme of the INA. Sections 1401 and 1409 set standards by which citizen parents may confer citizenship at birth upon their non-marital children born abroad. These provisions are part of a long statutory tradition which "has consistently recognized the rights of American parents to transmit their citizenship to their children," and reflects a congressional decision to extend citizenship to children born outside the United States. *Miller*, 523 U.S. at 477-79) (Breyer, J., dissenting).

The fact that Section 1409 imposes certain limitations on citizen parents' ability to transmit citizenship to their children does not detract from the fact that Congress' overriding purpose was to extend citizenship to non-marital children born abroad to a United States citizen. This conclusion is supported by this Court's finding in *Frontiero* v. *Richardson*, 411 U.S. 677, 691 n.25 (1973), that the "basic purpose" of the statutes at issue in that case "was to provide fringe benefits to members of the uniformed services," even though the statutes also established clear limitations, based on impermissible gender

stereotyping, on those who would be eligible for the benefits. *See also Weinberger* v. *Weisenfeld*, 420 U.S. 636, 651 (1975) (citing purpose of social security provision as "enabling the surviving parent to remain at home to care for a child" even though the provision limited benefits based on gender stereotypes); *United States Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 533-34 (1973) (citing purpose of federal food stamp program as "permit[ting] low-income households to purchase a nutritionally adequate diet through normal channels of trade," despite limitation, based on irrational classification, of food stamp benefit to certain households) (internal quotations omitted). As in those cases, the Court's removal here of the impermissible limitations on the conferral of citizenship at birth would conform with the INA's basic purpose.

Striking subsections 1409(a)(3) and (a)(4) would preserve the overall scheme erected by Congress to confer citizenship on the foreign-born children of U.S. citizen parents. These provisions "seem designed in significant part to address difficulties in proving paternity (along with providing encouragement for fathers to legitimate the child)." *Miller*, 523 U.S. at 489 (Breyer, J., dissenting). Proof of paternity is already mandated by subsection 1409(a)(1), which petitioners do not challenge here, and may be accomplished with reliability and relative ease through DNA testing. Moreover, there is no indication that Congress so strongly sought to encourage the act of legitimation by citizen fathers that, in the absence of that requirement, it would have altogether abandoned its policy of conferring citizenship at birth to the foreign-born children of unwed U.S. citizen parents, a policy that has persisted for more than two centuries. *See Miller*, 523 U.S. at 461-68 (Ginsburg, J., dissenting) (tracing history of statutes governing citizenship of foreign-born children).

On the contrary, the presence in the INA of a

severability provision strongly suggests that Congress would prefer severance of subsections 1409(a)(3) and (a)(4). *See* Immigration & Nationality Act, ch. 477, § 406, 66 Stat. 166, 281 (1952) (codified at 8 U.S.C. § 1101 note). That provision states as follows:

> If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Id. The presence of a severability clause "discloses an intention to make [a statute] divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained and that the scheme of regulation derivable from the other provisions would have been enacted without regard" to the invalid provision. *Champlin*, 286 U.S. at 235. "In such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987).

The INA's severability clause has already been construed by this Court to reflect Congress' preference for severability where a provision of the Act is found unconstitutional. *See INS v. Chadha*, 462 U.S. 919, 932 (1983). In *Chadha*, the Court found that "Congress itself has provided the answer to the question of severability" by including the severability clause. The Court noted that the clause "is unambiguous and gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend upon whether" the legislative veto provision was invalid. *Id.* Here, like in *Chadha*, "Congress could not

have more plainly authorized the presumption" that the requirements of subsections 1409(a)(3) and (a)(4) are severable from the remainder of Section 1409 and the INA generally. *Id.*; *cf. Mathews*, 465 U.S. at 739 n.5 (noting that severability clause "clearly expressed [Congress'] preference for nullification" of exception to pension offset provision of the Social Security Act).

A legislative intent not to sever the offensive provisions cannot be inferred from 8 U.S.C. § 1421(d). That provision states that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise."[9] Id. That provision is inapplicable here because citizenship at birth, acknowledgment of which is sought by the petitioners, does not constitute "naturalization" as that term is used in the INA. *See* 8 U.S.C. § 1101(a)(23) (defining "naturalization" as "the conferring of nationality of a state upon a person *after* birth, by any means whatsoever") (emphasis added).

In addition to the fact that severance complies with unambiguous congressional intent, the Court should sever subsections 1409(a)(3) and (a)(4) because that remedy properly "refrain[s] from invalidating more of the statute than is necessary" to correct the constitutional infirmity. *Regan* v.

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[9] Any attempt to read this provision as a congressional effort to preclude any form of judicial redress where provisions of the INA are found unconstitutional, would raise serious constitutional problems. *See Felker v. Turpin*, 518 U.S. 651, 661-62 (1996) (noting that since statute did not altogether repeal Court's power to review habeas corpus petitions, it did not deprive the Court of appellate jurisdiction in violation of Article III, § 2 of the Constitution); *Webster v. Doe*, 486 U.S. 592, 603 (1988) (referring to "serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim").

Time, Inc., 468 U.S. 641, 652 (1984) (plurality opinion); *see also Alaska Airlines*, 480 U.S. at 684. "[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *El Paso & Northeastern R. Co.* v. *Gutierrez*, 215 U.S. 87, 96 (1909). Severance of subsections 1409(a)(3) and (a)(4) adheres to these remedial principles and leaves a residual statute that is "fully operative as law." *See Buckley*, 424 U.S. at 108.

Furthermore, the severance remedy – which would remove burdens placed on citizen fathers and not on citizen mothers – is not only within the Court's power, but the Court has indicated a preference for removing burdens from and extending benefits to parties aggrieved by constitutionally underinclusive statutes. *See Westcott*, 443 U.S. at 89 ("In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course."); *see also Mathews*, 465 U.S. at 735 n.5 (quoting same); *Frontiero*, 411 U.S. 677 (resulting in extension of military fringe benefits to class of servicewomen); *see also Califano* v. *Goldfarb*, 430 U.S. 199 (1977) (resulting in extension of Social Security survivors benefits to class of widowers); *Califano* v. *Silbowitz*, 430 U.S. 924 (1977) (resulting in extension of Social Security insurance benefits to class of spouses of female wage earners); *Jablon* v. *Califano*, 430 U.S. 924 (1977); *Weinberger*, 420 U.S. 636 (resulting in extension of Social Security insurance benefits to class of spouses of female wage earners); *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974) (resulting in extension of disability benefits to subclass of illegitimate children); *Moreno*, 413 U.S. 528 (resulting in extension of food assistance to households containing one or more unrelated persons); *Richardson* v. *Griffin*, 409 U.S. 1069 (1972) (resulting in extension of Social

Security benefits to class of non-marital children of deceased wage earners); *Graham* v. *Richardson*, 403 U.S. 365 (1971) (resulting in extension of welfare benefits to class of aliens); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931) (ordering refund for tax paid in excess of amount assessed to others similarly situated to taxpayer).

At times, this preference for extension of benefits has been expressed as a means of effectuating Congress' primary purpose underlying the larger legislative scheme. *See, e.g.*, *Welsh*, 398 U.S. at 365-66 (Harlan, J., concurring) (noting that extension of conscientious objector status to secularists accords with overall congressional policy, which provides "compelling reason to hazard the necessary statutory repairs"). Because, as noted *supra*, severance of subsections 1409(a)(3) and (a)(4) leaves Congress' overall citizenship-at-birth scheme operative and intact, and furthers the "basic purpose" behind that scheme, the Court should advert to its practice in remedying constitutional infirmities in underinclusive statutes and fashion relief for petitioners that reduces their burdens rather than imposes burdens on others.

Finally, severance of subsections 1409(a)(3) and (a)(4) – thus equalizing the citizenship at birth scheme by lifting burdens imposed uniquely on citizen fathers – is more appropriate here than other remedial options, such as imposing these burdens on citizen mothers or denying altogether the conferral of citizenship by unmarried citizen parents to their foreign-born children. Not only would these latter options undermine Congress' unambiguous legislative purposes and depart from this Court's routine practice of extending rather than nullifying benefits where underinclusive statutes are deemed invalid, but they would also raise serious due process concerns by imposing burdens on persons not before the Court.

CONCLUSION

If the Court finds that the challenged gender classification in 8 U.S.C. § 1409 violates the Constitution, it must cure that violation and grant Nguyen and Boulais relief. Severance of the provisions that heap special burdens on U.S. citizen fathers comports with Congress' purpose in enacting the citizenship-at-birth provisions of the INA and accords with this Court's stated preference, when remedying constitutionally underinclusive statutory regimes, to remove burdens placed on the aggrieved party rather than impose such burdens on others.

Once those provisions are severed, Nguyen's eligibility for citizenship is measured by the remaining provisions of the INA governing conferral of citizenship. It is these provisions, and not the Court, that confer citizenship upon Nguyen. A contrary holding would undermine the time-honored principle of judicial review, as enunciated in *Marbury v. Madison*, for it would mean the Court is powerless to redress justiciable constitutional infirmities. Such a holding would impermissibly diminish this Court's role in our constitutional system of government.

For these reasons, the *amicus curiae* respectfully requests that the Court remedy the constitutional infirmity in 8 U.S.C. § 1409 by severing subsections (a)(3) and (a)(4) and acknowledge the citizenship, conferred by 8 U.S.C. § 1401(g) and the remainder of section 1409, of petitioner Nguyen.

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